SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 298

ZEPHYR AIRCRAFT CORPORATION,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

LORING M. BLACK,
Counsel for Petitioner.

WILLIAM E. BUCKLEY,
KERMIT F. KIP,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 298

ZEPHYR AIRCRAFT CORPORATION,
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vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Opinion Below

The opinion of the Court of Claims (R. 47) is officially reported in 104 F. Supp. 990.

Jurisdiction

The judgment of the Court of Claims was entered on June 3, 1952 (R. 60). The judgment of this Court is invoked under Section 1255(1) of Title 28, U. S. Code as amended June 25, 1948, c. 646, 62 Stat. 928.

Questions Presented

There are two questions presented in this case:

First—Is the decision of the Court of Claims an attempted usurpation of legislative power and therefore unconstitutional?

Second—Did the Special Act of June 15, 1946 (R. 13) create and declare the liability of the United States and confess judgment in favor of the petitioner?

Statute Involved

The only statute involved is the Act of Congress approved June 15, 1946 (Private Law 660), 79th Congress, 2d Session, reading as follows:

"An Act

"Conferring jurisdiction upon the Court of Claims of the United States to consider and render judgment on the claim of the Zephyr Aircraft Corporation against the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment on the claim of the Zephyr Aircraft Corporation, as successor to the Lenert Aircraft Corporation, against the United States for compensation for damage, injury, and losses suffered by the said Lenert Aircraft Corporation, because of the refusal by officials of the War Department to make a contract with the said Lenert Aircraft Corporation in compliance with section 10 of the Act of July 2, 1926 (44 Stat. 784), pursuant to a design competition for the procurement of primary training planes, which was projected by circular proposal 39-635, dated March 11, 1939.

"Sec. 2. In the determination of such claim, the United States shall be held liable for damages, and for any acts committed by any of its officers or employees,

to the same extent as if the United States were a private person.

"Sec. 3. Suit upon this claim may be instituted at any time within one year after the passage of this Act, notwithstanding the lapse of time, laches, the form and content of protest, and supporting papers thereof. Proceedings upon the determination of such claim and appeals from the payment of any judgment thereon, shall be in the same manner as in the case of claims over which the court has jurisdiction under section 145 of the Judicial Code as amended.

"Approved June 15, 1946."

Statement

The petitioner was a Michigan corporation which received an invitation to bid in a design competition conducted by the War Department pursuant to the Air Corps Act of July 2, 1926 (44 Stat. 784). Said invitation to bid contained an offer of a quantity procurement contract for airplanes to the winner or winners of said competition. The petitioner accepted the said offer subject to the condition precedent that its design be a winner in the competition and filed a bid together with its plans, aeronautical reports, and the necessary bond, but the Air Corps or the War Department wholly failed to evaluate or assign figures of merit to the design submitted by the petitioner in the competition, although the purpose of the Air Corps Act of 1926 was to compel an evaluation of all the designs submitted in order to preclude any questions as to the correctness of the award. In this manner the Air Corps or the War Department prevented the petitioner from fulfilling the terms of the condition precedent. The petitioner was subsequently advised by the Assistant Secretary of War that it was not a winner in the competition as a result of the evaluation of all designs. Thereafter petitioner filed a protest to said award and demanded arbitration pursuant to the Air Corps Act

of 1926, which was summarily denied by the Assistant Secretary of War. Petitioner also filed a protest with the Military Affairs Committee of the House of Representatives.

Subsequently upon representations made to the petitioner by the Assistant Secretary of War, that if the protest was withdrawn petitioner would be considered for an experimental contract, petitioner withdrew its protest and in so doing stripped itself of its review by Presidential appeal or appeal to the Federal Courts. Thereafter petitioner sought relief from Congress and the Special Act (R. 13) was enacted. A petition under the Special Act was thereupon filed in the Court of Claims. Testimony was taken and the Commissioner filed his report (R. 15). The Court of Claims rendered the decision together with special findings of fact (R. 47). It is from this decision and the judgment rendered thereon that petitioner seeks a writ of certiorari for the review thereof. The Court of Claims has held in effect that the Special Act did not create and declare the liability of the United States to the petitioner.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In attempting to usurp legislative power by repealing in its decision a law passed by Congress.
2. By dismissing the petition because the Court held that a novel rule of damages was intended by Congress under the Special Act, and which said rule they refused to find.
3. By holding that the Special Act, Private Law 660, was not a confession of liability on the part of Congress.
4. In holding that the petitioner in order to succeed must show that it would have won the competition.
5. In holding in effect that Congress in passing Private Law 660 did not intend to make the refusal by officials of the War Department to make a contract with petitioner actionable.

6. In substituting speculation and conjecture, based upon hearsay, in place of established facts.

7. In failing to render a judgment on the claim; i.e. in dismissing the petition of the petitioner based on the Special Act.

Reasons for Granting the Writ

1. The decision of the Court below involves an important constitutional question, as well as a question of statutory construction, and therefore is of the class of cases which this Court will customarily review.

2. The decision of the Court below is erroneous and is in conflict with a long line of earlier decisions by that Court, as well as decisions of other Courts, and is in conflict with the settled law. The questions presented are of wide importance and are of a similar nature to questions which have been passed upon in other instances by this Court, and the decision of the Court of Claims is in conflict with the prior decisions of this Court.

3. The questions presented are of wide and general interest since there is involved a review by the Court of Claims of Congressional discretion, as well as the proper interpretation of special legislation.

Conclusion

The assigned errors and the reasons for granting the writ asked will be discussed in the short brief accompanying this petition.

It is respectfully requested that the writ be allowed.

LORING M. BLACK,
Attorney for Petitioner.

WILLIAM E. BUCKLEY,
KERMIT F. KIP,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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No. 298

ZEPHYER AIRCRAFT CORPORATION,
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vs.

THE UNITED STATES,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Assignments of Error

(a) *When the Court of Claims substituted its judgment for that of Congress it usurped the legislative power which is vested solely in Congress under the Constitution.*

The broad constitutional power of Congress to pay the debts of the United States is beyond question. It is also beyond question that Congress has the power to change a moral obligation into a valid existing legal obligation which must be honored by the United States. It may be said that in this manner Congress is the "conscience of the country."

The claim of the petitioner herein was, in its inception, addressed to the conscience of Congress. Recognizing as it did, that the officials of the War Department had wronged

the petitioner, Congress gave redress by enacting the Special Act herein.

The Special Act declared the liability and confessed it in favor of the petitioner. However, since the damages were unliquidated, Congress referred the matter to the Court of Claims to ascertain the extent and amount of the damages which petitioner had suffered.

In enacting the Special Act, Congress exercised its discretion and in Section 2 thereof deprived the respondent of any defense of sovereignty and declared its liability for its acts to be "to the same extent as if the United States were a private person."

The opinion of the Court below did not carry out the intent of Congress. Instead of abiding by the Special Act, the Court of Claims apparently reviewed the Congressional discretion and substituted its own for that of Congress.

The crux of the decision below is found in this language of the Court:

> "We think that, in the circumstances, an award to the plaintiff of a contract for the quantity procurement of a type of plane which existed only upon blue prints would have amounted to a reckless waste of public funds and of crucial time in the preparation of the country's defenses." (R. 57).

This statement by the Court divulged the motivating force for its decision. The Court below, throughout its opinion, treated the respondent, not as an individual or private person, as Congress had intended, but as the sovereign. It disregarded completely the provisions of the Special Act which had stripped the respondent of its sovereign immunity. The Court was in effect legislating to repeal an act of Congress. It usurped powers which it did not possess. Created as it was by statute, it has now

pre-empted the powers of its creator. This it cannot do. Its error demands correction.

(b) *Was the Court of Claims justified in dismissing the petition because, in their opinion, Congress intended that a novel rule of damages would be applicable?*

The petitioner does not concede that any novel rule of damages would apply in the instant case. Under the confessed liability the well settled rules of damages would be controlling. To assume, as did the Court below, that a novel rule of damages must be found and applied, was no ground upon which to dismiss the petition.

The Court below stressed the fact that in order to comply with the Congressional intent, it must find that a novel rule of damages was applicable. The rationale seems to have been that if they agreed with the petitioner "that Private Law 660 was a confession by Congress of wrong doing on the part of the War Department in refusing to make a contract with the plaintiff, *we would still be completely frustrated in attempting to fix an amount of liability.*" (Emphasis supplied) (R. 57).

It is clear that the frustration which was felt by the Court below on the question of damages was a strong factor in the decision of dismissal. The opinion concluded with a continuation of the frustration when in again speaking on the question of the confession of liability by Private Law 660, the Court said in effect that even if the Act did confess liability "we would also have to find that it had enacted a novel rule for the measure of damages, before we could award damages to the plaintiff on the facts of this case." (R. 59). Thereupon it dismissed the petition.

Obviously the Court refused to abide by the direction of Congress.

The Court of Claims is a legislative Court, created by Congress, and as such is subject to Congressional directives. If Congress had seen fit to prescribe a novel rule of damages, as the Court below has assumed it did, then it was the duty of the Court to have applied to the facts any rule of damages which Congress, in its wisdom, saw fit to prescribe.

It was not the function of the Court below to dismiss the petition because of novelty or frustration. It was their duty to carry out and give voice to the intent of Congress. The Court of Claims has been remiss in its duty. Its errors warrant review by this Court.

(c) *Did the Special Act, Private Law 660, confess liability on the part of the Government?*

The answer to this question is "Yes." The Court below has nullified the intent of Congress to redress the wrongs done to the petitioner. It has said that there is nothing in the legislative history which indicates that the language employed should have any special meaning (R. 57). It is significant, however, that although the documents upon which the legislative history is based were admitted in evidence, *yet no findings of fact were made thereon by the Court*, despite the request of petitioner for such findings. A discussion of the intent of Congress and the legislative history is contained in the briefs in the Court of Claims (pp. 57-62, 108-124, 290-292) and we respectfully refer to those portions of the record now before this Court. There are, however, certain salient facts which cannot be overlooked. The first time the Special Act was passed by Congress it was pocket vetoed by President Roosevelt.

Another bill, H.R. 3094, was introduced in the 79th Congress, 1st Session, which subsequently became Private Law 660, the Special Act in question. Its history is set forth in

Senate Report 1235, 79th Congress, 2nd Session. At pages 6 and 7 of the said report the picture is clearly presented of the Congressional intent.

Rule 16 of the Claims Committee of the House of Representatives, which was a bar to the consideration of the bill, was unanimously waived when it was pointed out that this was a matter which President Truman, as a Senator, had investigated and about which he had reported to Congress as:

> "Another example which might be cited is the case of the Zephyr Aircraft Co., whose case was heard in an informal hearing with committee counsel. According to the record, the Zephyr Co., in response to an invitation for a design bid for a new type trainer, issued by the Army Air Corps, submitted a design which it claimed could be mass produced with unskilled labor at a cost of $3,000 each. The record further showed that this design was never even evaluated by the Army and they made no claim that the Zephyr people could not do all they said they could or that their design was unsatisfactory. Instead of purchasing a new design, a contract was let, at twice the cost, to another company for biplane trainers which were the same type, with some improvements, that had been used for many years and which are now being discontinued. The Zephyr people filed a protest which was apparently none too diplomatic but were never given a hearing by the War Department. It was testified further that, at the request of the Department, the company agreed to eliminate one individual who was personally distasteful to certain officials. They were told that they could have an experimental order and later told differently. Finally it was testified that they were told that no matter how good their plane was they could not get an order because of personalities involved and because it might look as if the Army was admitting a mistake in its original failure to give proper consideration to Zephyr's bid."

Had Congress intended to limit the liability it would have employed words of limitation similar to that employed by the same Congress in the Federal Tort Claims Act (Act Aug. 2, 1946, C. 753, 60 Stat. 843), wherein it was provided that "the United States shall be liable in respect to such claims * * * *in the same manner*, and to the same extent as a private individual * * *."

The words "in the same manner" are words of limitation which place the question of liability directly upon the Court for its determination. In the Special Act at bar, the words of limitation were significantly omitted. When Congress said "the United States shall be held liable for damages * * * to the same extent as if the United States were a private person" no limitation was placed on the liability. It was conceded. Only the *extent* of the damages was to be determined.

The Court below was in error. Its decision is contrary to the expressed intention of Congress.

(d) *Is it incumbent upon the petitioner in order to succeed in the litigation to show that it would have won the competition?*

The answer is emphatically "No." The petitioner could not show that it would have won the competition, since it was prevented from winning by the very acts of the respondent.

The respondent failed to evaluate the design of the plane submitted by the petitioner in the competition. In this manner the respondent prevented a comparison of the figures of merit which should have been awarded to the petitioner's design pursuant to the provisions of the Air Corps Act of 1926, with those figures given to the winning designs.

Furthermore, the Court of Claims treated this phase of the entire question as one in which only a competition

was involved. Its opinion completely ignored its Finding No. 5, that the contract contemplated by the Circular Proposal had as a condition precedent thereto that it would be awarded to the winner or winners of the design competition (R. 33). It is fundamental that one who promises to buy goods if satisfactory cannot set up the failure to perform the condition if by refusing to examine the goods he has prevented the condition from happening. (Williston on Contracts, Vol. III, Rev. Ed., p. 1953).

Yet the Court completely disregarded this phase of the matter and said in effect that the petitioner did not prove that it was the winner of the competition and therefore cannot recover. It has completely disregarded, not alone the fundamental principle of law, but has likewise completely disregarded the plain intent of Congress wherein in enacting Private Law 660, the petitioner's right of recovery was based upon "the refusal by officials of the War Department to make a contract with the said Lenert Aircraft Corporation in compliance with section 10 of the Act of July 2, 1926 (44 Stat. 784), pursuant to a design competition for the procurement of primary training planes, which was projected by Circular Proposal 39-635, dated March 11, 1939."

(c) *Did not Congress in its enactment of Private Law 660 intend to predicate the damage suffered by the petitioner upon the refusal of the officials of the War Department to make a contract with the petitioner?*

The answer to this question must be, we submit, in the affirmative. We cannot assume that the Act of Congress was a futile one. Congress being aware of all of the facts as a result of its investigations and being fully cognizant of the fundamental principles of law clearly determined in its own mind that the officials of the War Department and

their utter disregard of the clear intention of the Air Corps Act of 1926, had deprived the petitioner of that to which it was justly entitled and within its broad constitutional powers created for the petitioner a legal right to recover its damages where only a moral wrong had existed theretofore.

To permit the Court of Claims, a statutory creature, to thwart by its decision the clearly expressed intent of Congress should not be countenanced. The Court of Claims by its opinion and decision in the case at bar has stifled the voice of its creator.

(*f*) *Can the Court substitute speculation and conjecture based upon hearsay in place of established facts?*

Throughout its opinion the Court has used imagination, conjecture, and speculation, and it has gone to great length, we submit, in negating the findings of fact of its own Commissioner.

Perhaps the most glaring example related to the production facilities of the petitioner. Upon the hearings before the Commissioner the petitioner undertook to establish that it was ready, able, and willing to perform the contract contemplated by Circular Proposal 39-635. The respondent sought to controvert the proof of the petitioner, leaving thus for the consideration of the Commissioner the question of fact. The Commissioner, as the fact finder, found as follows:

> "The weight of the evidence establishes further that the plaintiff, with the production facilities it then had and the design data it had or could secure, could have produced experimental models of its airplane, as aforesaid, within any reasonable time required, but not less than 60 days. Although, the Circular Proposal or Invitation to Bid, No. 39-635, did not require proof

> of ability to produce in quantity, the weight of the evidence establishes that within a reasonable time after approval of experimental and service-test models and receipt of a quantity contract, considering preparations already undertaken, the plaintiff could have been tooled up and able to produce two planes per 24 hours." (R. 30).

However, the findings of the Court contain no finding upon this point. It has been completely omitted and instead this surprising statement is made:

> "As we have said, we think that when the War Department issued its invitation for bids, it contemplated the procurement of a large number of planes and, therefore, *impliedly limited* the design competition to bidders who submitted designs of planes of proven ability to perform and who had facilities for their prompt manufacture in quantity. The original statement, then, of the Engineering Evaluating Committee that it disregarded the plaintiff's design because of insufficient proof of ability to produce in quantity in the time required probably represented at least one of the principal reasons why, in the Committee's opinion, plaintiff's design was ineligible. *To be sure, no information was requested in the invitation for bids concerning the plaintiff's ability to produce planes. But the Committee may well have known, by hearsay and report* among persons familiar with the plane manufacturing business, how little the plaintiff had in the way of production facilities." (Emphasis supplied) (R. 53).

Obviously the Court was speculating upon what the Committee may well have *known by hearsay* concerning the production facilities of the petitioner. Clearly it disregarded the testimony and the findings of fact of its own Commissioner. In so doing it completely disregarded its own duties which it said in its opinion were "to ascertain

the facts, apply the law, determine that there is, or is not, liability, and if there is liability, the amount of it" (R. 57).

When the Court of Claims indulged its own speculation and conjecture upon hearsay then, we submit, its error by its own concept of its duties is so apparent that redress by appeal should be given to the petitioner.

Reasons for Granting Writ

(a) *A Constitutional Question is presented as well as a Question of Statutory Construction*

The decision of the Court below is in direct conflict with the powers of Congress as set forth in the Constitution. Although only a statutory Court, it has nevertheless held in effect that Congress has not the power to confess judgment in the instant case. It has presumed to legislate by its decision and, in effect, repeal Private Law 660. It has construed the Special Act in such a manner as to completely nullify the expressed will of Congress. Its interpetation of Private Law 660 makes of the Act a futile thing. Its confessed frustration, in following the directive of Congress, and its refusal to do so, have made its decision in the instant case illogical and illegal.

It cannot be doubted that the questions here involved are of the precise type which this Court will ordinarily review.

(b) *The decision is in conflict with prior decisions*

The decision of the Court of Claims has held in effect that Congress was without authority to confess liability in the instant case. Such a holding by the lower Court is in direct conflict with all of those cases wherein it has been established that the power to grant relief in a case such as this, is vested solely in Congress by the Constitution. (*Boudinot* v. *U. S.*, 18 Ct. Cl. 716; *Garrett* v. *U .S.*, 70 Ct. Cl. 304; *Mansfield* v. *U. S.*, 89 Ct. Cl. 12; *Burkhardt* v. *U. S.*, 84 F. Supp.

553; *Pope* v. *U. S.*, 323 U. S. 1; *Norfolk Southern R. R. Co.* v. *U. S.*, 96 Ct. Cl. 357.)

In its refusal to treat the respondent as a private person in accordance with the expressed intent of Congress, the decision of the Court below is in direct conflict with the prior decisions in the following cases: *Walton* v. *U. S.*, 24 Ct. Cls. 372; *June Carroll, et al.* v. *The District of Columbia*, 22 Ct. Cls. 104; *Joseph Irwin & Co.* v. *U. S.*, 23 Ct. Cls. 154; *Sanger and Moody* v. *U. S.*, 40 Ct. Cls. 47.

The Court below in effect reviewed the legislative discretion exercised by Congress and used its own discretion in rendering its decision.

It is well settled that the Courts will not review legislative discretion unless the same may be termed arbitrary or capricious. The question of the relief sought by the petitioner before Congress was clearly a matter of legislative discretion. The relief granted in the Special Act was neither arbitrary nor capricious. The Court below was powerless to review it. It was solely the responsibility of Congress. (*Walton* v. *U. S.*, *supra*; *Guttormsen* v. *U. S.*, 43 Ct. Cls. 299.)

The Court below, in its frustration over the question of damages failed to consider that it was within the power of Congress to grant any relief which in its wisdom it saw fit to grant. (*Indians of California* v. *U. S.*, 98 Ct. Cls. 583; *Radel Oyster Co.* v. *U. S.*, 78 Ct. Cls. 816; *U. S.* v. *Realty Co.*, 163 U. S. 427; *Roberts* v. *U. S.*, 92 U. S. 41.)

The Court of Claims after denying that the Special Act was a confession of liability, failed to apply the well settled rules of law relating to breach of contract and its subsequent damages. The proposition is a simple one. The respondent offered to contract with the winner of a design competition. The petitioner accepted the offer. At this point there was a binding contract (*Minton* v. *F. G. Smith Piano Co.*, 36 App. D. C. 137).

The contract, however, was subject to the condition precedent that petitioner should be the winner (Finding No. 5; R. 33). When the respondent failed to evaluate the design, by its own act, it prevented the performance by the petitioner. Obviously, it cannot set up the failure to perform, in defense of its own act which prevented the performance. Yet this is precisely the tenor of the decision below which in effect has held that since petitioner could not prove it would have won because of the acts of the respondent, therefore, it is without remedy.

Its holding on this point is contrary to the Special Act itself, as well as the general principles of law applicable to the instant case, and the prior decisions of the Court below and Courts of other jurisdictions. It is in conflict, we submit, with the following decisions:

St. Louis Beef Co. v. *Casualty Co.*, 201 U. S. 173;
Jordan v. *Busch*, 1 N. E. 2nd 745 (Ill.);
Marvin v. *Rogers*, 53 Tex. Civ. App. 423;
Dill v. *Pope*, 29 Kan. 289;
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White v. *Elgin Creamery Co.*, 79 N. W. 283;
Minton v. *F. G. Smith Piano Co., supra;*
Purcell Envelope Co. v. *U. S.*, 47 Ct. Cl. 1;
Georgia Wholesale Co. v. *U. S.*, 84 Ct. Cl. 150.

Had the lower Court correctly interpreted the Special Act, it would not have been frustrated by the rule of damage. Its failure to do so, has placed its decision in direct conflict with the well settled rules of damages as expressed by this Court:

Wicker v. Hoppock, 6 Wall. 94;
Miller v. *Robertson*, 266 U.S. 243;
Purcell Envelope Co. v. *U.S.* supra;
U. S. v. *Behan*, 110 U.S. 338;

Philadelphia W. & B. v. *Howard*, 13 How. 307;
St. Louis Beef Co. v. *Casualty Co., supra.*

In *Wicker* v. *Hoppock, supra,* at page 99 the Court laid down the fundamental rule saying:

> "The general rule is that when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injuries. The latter is the standard by which the former is to be measured."

In the case at bar the Special Act gave to the petitioner the remedy. The damages were to be ascertained by the Court. In view of the well settled rule of damage it is hard to conceive the frustration felt by the Court below on this question.

Mr. Justice Holmes in *St. Louis Beef Co.* v. *Casualty Co. supra,* succinctly stated the rule at page 181, wherein he said:

> "In general when one party by his fault prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit less the value or cost of what plaintiff would have had to do to get it . . ."

It would appear that the damages which Congress directed the Court of Claims to admeasure and award to the petitioner were ascertainable under the well settled rules of damage.

The Case Is of General Interest

Undoubtedly, Congress will, in the future have many instances wherein it will grant relief under special acts. Since the Court of Claims has developed a tendency to review Congressional discretion and has found difficulty in interpreting such special acts, a final decision by this Court

as to the proper interpretation and application of such special acts is therefore of wide and general interest.

LORING M. BLACK,
Attorney for Petitioner.

WILLIAM E. BUCKLEY,
KERMIT F. KIP,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 298

ZEPHYR AIRCRAFT CORPORATION, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 47-60) is reported at 104 F. Supp. 990.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1952 (R. 60). The petition for a writ of certiorari was filed on August 28, 1952.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the court below correctly held that Private Law 660, 60 Stat. 1227, conferring jurisdiction upon the Court of Claims to hear and determine petitioner's claim against the United States for refusal to award it a contract for military aircraft, was not an admission of respondent's liability leaving only damages to be assessed.

2. Whether the court below correctly held that such refusal to award a contract did not entitle the petitioner to recover damages from the United States.

STATUTE INVOLVED

The applicable statute is set out in the Appendix, *infra*, pp. 20-21.

STATEMENT

Petitioner brought suit against the United States to recover damages alleged to have been suffered because officials of the War Department refused to award a contract for military aircraft. The action was begun under a private act[1] conferring jurisdiction upon the Court of Claims "to hear, determine, and render judgment" on petitioner's claim.

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[1] Private Law 660, 79th Cong., 2d Sess., 60 Stat. 1227, June 15, 1946, set out in the Appendix, *infra*, pp. 20-21.

Petitioner, formerly known as the Lenert Aircraft Corporation (R. 31), was one of twelve firms which responded to an invitation to bid in a competition for new and improved designs of primary training planes. The competition was sponsored by the War Department in 1939 pursuant to Section 10 of the Air Corps Act of July 2, 1926, 44 Stat. 780, 784, 10 U.S.C. 310.[2] The invitation to bid

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[2] The purpose of Section 10 of the Air Corps Act is to encourage the development of aviation and to improve the efficiency of Army and Navy aviation materiel. Subsection (a). The Act establishes a procedure under which the Secretary of War invites the submission in competition of new designs of aircraft, aircraft parts and accessories. The bidder is required to state the price for which the designs will be sold to the Government. *Ibid.* The Act provides for the evaluation of the designs by a board appointed for that purpose by the Secretary and for the board's report to him as to the winner or winners of the competition; but if he disapproves the report he may return the report to the board for revision "or the competition [shall] be decided by the Secretary, in his discretion, and in any case the decision of the Secretary shall be final and conclusive." Subsection (b). Thereupon, the Secretary "is authorized to contract with the winner or winners in such competition on such terms and conditions as he may deem most advantageous to the Government" for furnishing the materiel within a reasonable time, or if the Secretary shall decide that a winner cannot reasonably carry out such a contract, the Secretary "is authorized to purchase the winning designs" at an agreed price but not in excess of the bid (Subsection (c)), and he may then contract with others to construct the materiel in accordance with such designs. Subsection (g). If, in the judgment of the Secretary, none of the designs submitted is of sufficient merit, "then he shall not be obligated to accept any of such designs". Subsection (f). The Act also provides that if any participant in the competition shall make

(called Circular Proposal 39-635) contemplated a quantity procurement of the planes of the bidder's design and asked for bids on quantities up to 1,000 (R. 33, 49). But winning the design competition was a condition precedent to the award of the contract contemplated by the invitation (R. 33-34). Moreover, under the established Army procurement policy, a quantity procurement contract could not be awarded for an unproven plane; such a plane could only be the subject of an experimental order (R. 45, 50).[3]

The design submitted by petitioner was based upon well-known principles of aero-dynamics, presented little that was new, but did incorporate a device to reduce the possibility of spins (R. 34). However, the flight characteristics of the proposed plane had not been determined by reduction to practice—there was no working model and such

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to the Secretary "a reasonable showing in writing that error was made in determining the merits of designs submitted whereby such claimant was unjustly deprived of an award," the matter shall be referred to a board of arbitration and its finding, with the approval of the said Secretary, shall be conclusive on both parties. Subsection (h).

[3] Under established Army procurement policy, if an experimental plane, *i.e.*, a plane not reduced to practice, had sufficient merit upon evaluation of its design, a contract could be let for an experimental order of one to three planes. If, after construction and testing, the experimental plane was found to have merit, the contractor might be given an order for a service-test quantity of 13 planes. If, after testing the service-test quantity, the plane was found suitable, an additional quantity procurement contract could be let (R. 45).

a plane had never been built (R. 34, 46). Indeed, at the time of the design competition, petitioner was not actively operating as a plane manufacturer (R. 32).[4] While these factors had no bearing on the design competition, they did predetermine petitioner's ineligibility for the quantity procurement contract contemplated by the Circular Proposal (R. 46).[5] Moreover, the Circular Proposal provided that as a prerequisite to a bid for the sale of the plane in quantity, the bidder must also submit a bid for the sale of the design (R. 44). Petitioner was not interested in selling its design and its bid was confined solely to a quantity sale of its proposed plane (*ibid.*).

The competition closed on July 7, 1939. Three weeks later, the evaluation officers supervising the competition submitted a report to the Secretary of War recommending three winners. The report

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[4] Petitioner had been organized by Willy Lenert who had been interested in aviation since 1909. He built a few planes during the 'twenties but his corporation, which at its peak employed only eight or ten men, apparently became inactive after the 1928-1931 economic crash. In 1939, a production specialist became interested in the Mr. Lenert's company and furnished $3000 to finance the design which was submitted in the competition involved in this action. (R. 31-32). The design was prepared by college engineering students working under the supervision of a graduate student and a professor of aeronautical engineering (R. 34). The design was for a monoplane, a type of aircraft which, up to that time, was unacceptable to the Air Corps for primary training use due to factors affecting controllability and maneuverability (R. 39).

[5] See fn. 3, *supra*.

stated that petitioner's design was disregarded because of "Insufficient proof of ability to produce in quantity in the time required" (R. 35). Five other designs were similarly disregarded (*ibid.*). The report was returned by the Secretary for further proceedings because of the Evaluation Board's failure to evaluate all of the designs submitted or to assign proper reasons for not doing so (R. 36-37). It was his view that the appraisal must be made upon the basis of designs and not upon the basis of reduction to practice or ability to produce, as these were matters to be considered after the determination of the winners (R. 37, 51). Information as to production facilities had not been requested by the Circular Proposal (R. 49-50).

Thereafter, the facts relating to the engineering analysis of the rejected designs were reexamined. Although petitioner's proposed airplane received some favorable comment, the Evaluation Board, in its final report, stated that it was disregarded because its "performance, aerodynamics, installations, and structural features were not susceptible to proofs of the practicability of such designs for reduction to practice" (R. 38).[6]

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[6] Under the terms of the Circular Proposal this was a sufficient reason for disregarding the design (R. 37, 52), although inability to produce in quantity in the time required probably remained as one of the principle reasons for rejection (R. 53-54).

On September 6, 1939, the Air Corps announced as winners of the competition the three firms originally recommended by the Board (R. 40). A few days later, a contract for 480 planes was negotiated with the first place winner. During the years 1939-1945 a total of 12,300 primary training planes were purchased from the three winners (*ibid.*).

On September 9, 1939, petitioner sent a telegram to the Secretary of War protesting the result of the competition and requesting arbitration under the provisions of Section 10(h) of the Air Corps Act (R. 41). The Secretary rejected the protest for the reason that petitioner had failed to make "a reasonable showing in writing that error was made in determining the merits of designs submitted", whereby petitioner was deprived of an award, as required by that Section (R. 42). Petitioner then filed a protest with the Military Affairs Committee of the House of Representatives (R. 43).

Thereafter, a representative of petitioner conferred with the Assistant Secretary of War in an effort to obtain an experimental contract under Section 10(k) of the Air Corps Act. Such a contract could be awarded without competitive bidding. The representative was told that Mr. Lenert, petitioner's then president, was unreliable and troublesome, but that an experimental contract would be considered if Mr. Lenert was ousted

from the corporation and if petitioner withdrew its protest under the Circular Proposal (R. 43). Petitioner thereupon changed its name, Mr. Lenert resigned as president, and the protests to the Secretary of War and the Committee of the House were withdrawn (R. 43-44). In June, 1940, petitioner's plant and personnel were inspected by the Air Corps. The inspectors reported that both were insufficient to justify a contract. The Assistant Secretary of War then informed petitioner that a contract would not be awarded. Three additional inspections were made in August and September, 1940, and January, 1941, but the reports were the same and the Assistant Secretary did not change his position (R. 44, 47). Petitioner subsequently sought and obtained private legislation permitting suit upon its claim based upon the denial of a contract, and this action followed.

The Court of Claims held that Private Law 660 conferred jurisdiction to determine the merits of petitioner's claim and was not a Congressional confession of liability; that the Circular Proposal contemplated a procurement contract for a plane whose satisfactory performance and availability for quantity production, with its improvements, were certain; that the refusal to award a contract to petitioner did not constitute an actionable wrong; that petitioner could not have won the competition; and that, in any event, its alleged damages were too speculative to support a judgment. Accordingly, the petition was dismissed.

ARGUMENT

1. Petitioner asserts that in denying recovery the decision below usurped the legislative power which is vested solely in Congress and also nullified the express will of Congress (Pet. 7, 16). This argument is based upon a demonstrably erroneous premise which pervades the entire petition, *viz.*, that the private act conceded liability on the part of the United States and conferred jurisdiction upon the Court of Claims merely to assess damages. But nowhere in the act is there language which either admits or concedes liability. Rather, the language of the act clearly contemplates that the Court of Claims shall, as the decision below correctly states (R. 57), "ascertain the facts, apply the law, determine that there is, or is not, liability, and if there is liability, the amount of it."

(a) It has long been established that special jurisdictional acts must be strictly construed (*United States* v. *Goltra*, 312 U.S. 203, 210) and unless the language is very clear they are never to be construed as conceding the liability of, or imposing it upon, the United States (*Gregory* v. *United States*, 57 F. Supp. 962, 970 (C. Cls.), certiorari denied, 326 U.S. 747; cf. *Pine Hill Co.* v. *United States*, 259 U.S. 191, 196; *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686). For, it is presumed that if Congress intends to do more than afford a forum to test the liability, that intention will be "expressed in language not to be

misunderstood." *United States* v. *Cumming*, 130 U.S. 452, 455. Absent such clear and unambiguous language, special legislation conferring jurisdiction upon the Court of Claims "to hear, determine, and render judgment" on a claim is not to be construed as an admission of liability, but simply as providing "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 500. The cases acknowledging the point are numerous.[7]

The private act in this case conferred jurisdiction upon the Court of Claims "to hear, determine, and render judgment" on petitioner's claim against the United States and provided that, "In the determination of such claim, the United States shall be held liable for damages, and for any acts committed by any of its officers or employees, to the same extent as if the United States were a private person." Petitioner points to no words which meet the test of the above cases, that the language indicating an admission of liability must be very clear and not such as can be misunderstood, but relies instead upon these words equating the United States to a private person (Pet. 12)—

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[7] *E.g.*, *United States* v. *Cumming*, *supra*; *Grant* v. *United States*, 192 F. 2d 482, 484 (C.A. 4); *United States* v. *Durrance*, 101 F. 2d 109 (C.A. 5); *Hempstead Warehouse Corp.* v. *United States*, 98 F. Supp. 572, 573 (C. Cls.); *Gales* v. *United States*, 87 C. Cls. 358, 371; *Gregory* v. *United States*, *supra*; *Randall* v. *United States*, 71 C. Cls. 152, certiorari denied, 283 U.S. 826; *Stanton* v. *United States*, 68 C. Cls. 379.

words which obviously qualify not only the extent of the damages to be awarded but also the nature of the liability to be determined. The plain meaning of the act is that the United States shall be liable only if a private person would be liable in like circumstances; but it remains for the court to determine whether petitioner's claim is recognizable in law. Cf., *Feres* v. *United States*, 340 U.S. 135, 141. And apparently even petitioner admits that a private person would not be liable here for it concedes that its claim is a moral one, rather than legal, and was "addressed to the conscience of Congress" (Pet. 7). It is true of course that Congress may, by private legislation, convert a moral into a legal obligation (*Pope* v. *United States*, 323 U.S. 1, 9-10), but, in the absence of clear language or other manifestation of legislative intent, private acts are not to be construed as creating a new cause of action where none exists at law[8] and this language of the private act affirmatively demonstrates that such was not intended.

The decision below did not deny that Congress possesses power to create and confess liability, as petitioner asserts and assumes (Pet. 16-17), but the decision did deny that such power had here

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[8] *Stewart* v. *United States*, 206 U.S. 185, 194; *Tillson* v. *United States*, 100 U.S. 43; *Massey* v. *United States*, 198 F. 2d 359 (C.A. 4); *United States* v. *Durrance*, *supra*; *Kuhnert* v. *United States*, 127 F. 2d 824, 826 (C.A. 8); *Braden* v. *United States*, 16 C. Cls. 389, 412.

been exercised. In reaching that conclusion, the court below adhered to and applied principles which are well settled and which, in this instance at least, require no further amplification or clarification.[9]

(b) The legislative history of the private act fails to disclose any congressional intention to concede liability. On the contrary, it indicates that Congress intended that petitioner have a day in court on the merits and no more. A bill (H. R. 5543) conferring jurisdiction upon the Court of Claims "to hear, determine and render judgment" on petitioner's claim was first introduced in the 77th Congress.[10] It is important to observe that

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[9] Cases holding that particular private acts did concede liability, cited by petitioner (Pet. 16-17) as in conflict with the decision below, are inapposite as they rest upon the distinctive language of the particular acts involved or the legislative history of such acts.

[10] Petitioner's unsuccessful efforts to obtain a contract were related to Congress in the remarks of Representative Hook seven months before he introduced the bill. 87 Cong. Rec., pt. 1, pp. 297-302, 77th Cong., 1st Sess. (Jan. 24, 1941). Thereafter, through a Resolution of Inquiry, Congress submitted a series of questions to the War Department relating to petitioner's claim H.Res. 140, 77th Cong., 1st Sess. The answers of the War Department, together with comments thereon by petitioner's president, are set forth in the congressional committee reports relating to the two private bills which were subsequently introduced. See reports cited fn. 14, *infra*. In June, 1941, the matter was also brought before the Special Committee to Investigate the National Defense Program (the "Truman Committee"). S. Rept. No. 480, Part 5, 77th Cong., 2d Sess., p. 63.

Section 3[11] of the bill barred the United States from raising two substantive defenses therein specified. The fact that two designated defenses—rather than all—were barred, significantly indicates under the rule of *expressio unius, exclusio alterius,* that the draftsman's intent that the merits of the claim, not merely the question of damages, were to be adjudicated. Both the Secretary of War and the Attorney General, whose views on the proposed bill were solicited by the Chairman of the Committee on Claims, recommended against enactment of the bill, the Secretary on the ground that there was no legal basis for the claim,[12] the Attorney General—refraining from discussing the merits of the claim because he had no information to guide him—on the ground, that it included a "provision which would waive substantive defenses to a claim against the Government."[13] The bill died in committee.

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[11] "Sec. 3. In the proceedings upon such claim before the Court of Claims the United States shall not avail itself of the defense that the officials of the United States, who were involved in this transaction, acted without the authority of the United States or that the Lenert Aircraft Corporation did not have a flying model."

[12] Letter dated December 9, 1941, of Henry L. Stimson, Secretary of War, addressed to Hon. Dan R. McGehee, Chairman, Committee on Claims. S. Rept. No. 909, 78th Con., 2d Sess., pp. 2-4; S. Rept. No. 1235, 79th Cong., 2d Sess., pp. 2-5.

[13] The Attorney General also opposed provisions of the bill requiring that the damages include prospective profits and interest on the claim, and waiving the form and content of petitioner's protest and withdrawal thereof. Letter dated

Another bill (H.R. 3596) was introduced in the 78th Congress. Its wording was identical with that of the previous bill with one notable exception, *viz.*, the new bill omitted the section which provided for the waiver of the Government's substantive defenses. The obvious implication is that the draftsman had removed the waiver provision because of the opposition which the Attorney General had previously expressed and that the United States was to be free to raise whatever defenses it might have. The House Committee on Claims recommended "favorable consideration to the proposed bill giving the [petitioner] *an opportunity to be heard* in the Court of Claims" (emphasis added).[14] The bill was passed by both houses of Congress but was pocket vetoed by President Roosevelt.[15]

December 16, 1941, of Francis Biddle, Attorney General, addressed to Hon. Dan. R. McGehee, Chairman, Committee on Claims. S. Rept. No. 909, p. 4, *supra;* S. Rept. No. 1235, p. 5, *supra.*

[14] H. Rept. No. 1145, 78th Cong., 2d Sess., p. 1. The Senate Committee adopted the House Report. S. Rept. 909, 78th Cong., 2d Sess. The same language appears in the Senate and House Reports recommending enactment of the bill which became Private Law 660. S. Rept. No. 1235, 79th Cong., 2d Sess., p. 2.

[15] The President's Memorandum of Disapproval states that the bill would permit petitioner to sue the United States for the failure of the War Department to award a contract; that the act under which the competition was held does not require the Secretary of War to award a contract to the lowest bidder

A third bill (H.R. 3094) was introduced the next year in the 79th Congress. Its wording was essentially the same as the first bill except (a) it omitted the section waiving the Government's substantive defenses, but (b) it added new provisions expressly declaring that officials of the War Department had acted illegally and without authority in failing to evaluate petitioner's design and in contracting for planes which had theretofore been in production instead of planes of a new design, all in violation of the Air Corps Act. Recommended favorably by the House Committee on Claims[16] with only a slight amendment (striking a provision for interest on the claim), the bill moved to the Senate where it was altered substantially in committee. Significantly, all references to the supposed violation of the Air Corps Act and to the alleged illegal conduct were stricken out. In their place was inserted the present Section 2 declaring that the United States shall be held liable for acts

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but gives him discretion to consider the bids and select those which in his judgment had won the competition; that the act authorizes a participant in the competition to protest the award; that although such protest was here filed and the Secretary of War had found the protest to be without merit, the protest was later voluntarily withdrawn; and that in these circumstances "it is not sound policy to enact special legislation giving the company the right to sue in the Court of Claims" H. Rept. No. 1064, 79th Cong., 1st Sess., p. 5; S. Rept. No. 1235, 79th Cong., 2d Sess., p. 6; 90 Cong. Rec., Pt. 5, p. 6713.

[16] H. Rept. No. 1064, 79th Cong., 1st Sess.

of its employees "to the same extent as if the United States were a private person." Also stricken was the provision as to the prospective profits. With these amendments set forth without comment, the Senate Committee on Claims adopted the House Report on the bill and recommended favorable action (S. Rept. No. 1235, 79th Cong., 2d Sess.). The bill was thereupon enacted into law.

In summary, the legislative history discloses that the original bill intended that the merits of the claim be adjudicated by the Court of Claims but that the respondent be barred from raising certain defenses. The bar provision was later deleted by the draftsman, apparently to meet the objections of the Attorney General. When the President vetoed the second bill on the ground that the denial of a contract to petitioner was not improper, a third bill was introduced seeking an express acknowledgment by Congress of the illegality of the conduct of War Department officials. But Congress rejected this acknowledgment and substituted a provision that the respondent's liability be determined as would that of a private person. That history, we submit, is wholly irreconcilable with petitioner's contention that Congress intended to confess judgment and merely have the court assess damages. The language of the Act and its history compel the conclusion, correctly stated below, that Congress

intended that the Court of Claims adjudicate the question of liability. This aspect of the decision rests upon the wording of this one private bill and the particular circumstances attendant upon it. It raises no problem common to other litigation and is not of such importance as to warrant certiorari.

2. The holding below that no actionable wrong was committed against the petitioner was correct. Despite petitioner's assertions to the contrary (Pet. 3, 17), the invitation to bid was not an offer which petitioner accepted and which thereby resulted in a contract. The Circular Proposal merely invited an offer; it was the petitioner who was the offeror, for it was petitioner who—through submission of its design and bid—described the material offered and fixed the selling price. The bid was never accepted, hence no contract was consummated and there could be no breach. Even if petitioner's design had been adjudged the winner of the competition and the War Department had nevertheless awarded a contract to another party, no cause of action would lie. *Martin* v. *United States*, 61 C. Cls. 430. The obstacles to the cause are (a) under the established Army procurement policy, petitioner's proposed plane was ineligible for the quantity procurement contract contemplated by the Circular Proposal (R. 45, 46, 50); (b) by refusing to submit a bid on the sale of its design as distinguished from sale

of the planes, petitioner failed to comply with an explicit condition of the Circular Proposal (R. 44); and (c) the Secretary of War was under no legal obligation to award any contract—under the Air Corps Act he is "authorized", not required, to contract with the winner (10 U.S.C. 310 (c), (f)).[17]

Nor was an actionable wrong committed when the War Department subsequently refused to award a negotiated experimental contract to petitioner under Section 10(k) of the Air Corps Act (10 U.S.C. 310(k)). Apart from the fact that Private Law 660 limited the court's jurisdiction to the claim based upon the refusal of a contract under the design competition, the action of the Secretary of War under that section is purely discretionary, and normally is not reviewable by the courts. Cf. *Louisiana* v. *McAdoo,* 234 U.S. 627,

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[17] These factors distinguish this case from *Minton* v. *F. G. Smith Piano Co.*, 36 App. D.C. 137 (Pet. 17), where defendant unqualifiedly offered a prize to the person who correctly counted the dots in an advertisement; plaintiff did so and the court held there had been an offer, an acceptance and a binding contract. These factors, too, remove this case from the rules which apply when one party to an existing contract prevents the happening of a condition precedent, discussed in petitioner's other citations (Pet. 18). Here, there was no existing contract. If there was, petitioner's ineligibility for the contemplated quantity contract nullified the effect of the happening of the condition precedent (*i.e.*, winning the design competition). In any event, petitioner's damages were too speculative to support a judgment, for the reasons indicated in the decision below (R. 59).

633. No abuse of discretion was shown: petitioner's plant and personnel were reported deficient after each of four different inspections, and, as the court below found with regard to the design competition (R. 54, 57), it is unthinkable that in a crucial period of the country's defenses the War Department would be expected to award a quantity contract for a plane which existed only on blue prints.

CONCLUSION

This case involves no question of general importance and there is no conflict. In dismissing the cause, the court below correctly applied well established legal principles to the particular circumstances presented. It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

ROBERT L. STERN,
Acting Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
LESTER S. JAYSON,
Attorneys.

OCTOBER, 1952.

APPENDIX

Private Law 660, 79th Cong., 2d Sess., 60 Stat. 1227, approved June 15, 1946, provides:

An Act

Conferring jurisdiction upon the Court of Claims of the United States to consider and render judgment on the claim of the Zephyr Aircraft Corporation against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment on the claim of the Zephyr Aircraft Corporation, as successor to the Lenert Aircraft Corporation, against the United States for compensation for damage, injury, and losses suffered by the said Lenert Aircraft Corporation, because of the refusal by officials of the War Department to make a contract with the said Lenert Aircraft Corporation in compliance with section 10 of the Act of July 2, 1926 (44 Stat. 784), pursuant to a design competition for the procurement of primary training planes, which was projected by circular proposal 39-635, dated March 11, 1939.

SEC. 2. In the determination of such claim, the United States shall be held liable for damages, and for any acts committed by any of its officers or employees, to the same extent as if the United States were a private person.

SEC. 3. Suit upon this claim may be instituted at any time within one year after the passage of this Act, notwithstanding the lapse of time, laches, the form and content of protest, and supporting papers thereof. Proceedings upon the determination of such claim and appeals from the payment of any judgment thereon, shall be in the same manner as in the case of claims over which the court has jurisdiction under section 145 of the Judicial Code as amended.

Approved June 15, 1946.

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